

STATE OF MICHIGAN
COURT OF APPEALS

THERESE BALLO,

Plaintiff-Appellee,

v

RICHARD C. BRANSTROM,

Defendant-Appellant.

UNPUBLISHED

April 21, 2009

No. 287762

Delta Circuit Court

LC No. 08-019370-DM

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right the circuit court's order granting plaintiff and defendant joint legal custody and granting plaintiff sole physical custody of the parties' minor children. We reverse and remand for further proceedings consistent with this opinion.

Defendant argues that the circuit court erred when it held that an established custodial environment did not exist with either party. We agree, and conclude that the court should have determined that an established custodial environment existed with both parties.

We must affirm a custody order unless the circuit court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error concerning a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 877-878 (BRICKLEY, J.), 900 (GRIFFIN, J.); 526 NW2d 889 (1994). Findings of facts in child custody cases are reviewed under the great weight of the evidence standard. *Id.* Whether an established custodial environment exists is a question of fact. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). Thus, a circuit court's findings regarding whether an established custodial environment exists must be upheld unless the evidence clearly preponderates in the opposite direction. *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

The circuit court must consider and determine whether an established custodial environment exists before it makes a determination regarding the children's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000); *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994).

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline,

the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). In determining whether an established custodial environment exists, “the focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment.” *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). An established custodial environment can exist with both parents and in more than one home if the child naturally looks to both the mother and father for guidance, discipline, the necessities of life, and parental comfort. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001); see also *Rittershaus*, 273 Mich App at 471.

The circuit court must provide a factual basis and articulate its reasons for finding whether an established custodial environment exists. See *Foskett*, 247 Mich App at 8. In rendering its decision that an established custodial environment did not exist with either party, the circuit court in this case stated:

First of all, I would find that there was no established custodial environment that was for this Court to consider. I recognize for about the last eight months it had evolved into a circumstance where there was pretty much equal time spent with the children; but, nonetheless, that did not develop into an established custodial environment over an appreciable amount of time.

This statement contains little factual support and does not sufficiently explain why the court found that an established custodial environment did not exist with either plaintiff or defendant.

After reviewing the record, we conclude that the circuit court’s finding concerning the existence of an established custodial environment was against the great weight of the evidence. MCL 722.28. The record evidence clearly showed that an established custodial environment existed with both parents in this case. The testimony revealed that since the children’s birth, both plaintiff and defendant had provided for the children’s needs. The testimony further established that the children had always looked to both plaintiff and defendant for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c). There was no indication on the record that any of this changed after the parties separated or at any time prior to the divorce hearing.

It is true that repeated custodial changes can destroy a previously established custodial environment. *Baker*, 411 Mich at 581-582; *Bowers v Bowers*, 198 Mich App 320, 326-327; 497 NW2d 602 (1993). However, unlike the children in *Baker* and *Bowers*, the children in the present case were not shuffled back and forth between various states and multiple homes. Nor were they subjected to multiple and repeated changes in custody. In this case, the children’s time was merely split between two homes in the same state, one of which they had lived in since birth. Further, the past exchanges of the children between plaintiff and defendant were not so irregular

or impromptu as to create uncertainty in the children's lives or destroy their expectations of permanency.

In short, we conclude that the circuit court erred by finding that no established custodial environment existed with either party. Instead, the court should have determined that an established custodial environment existed with both parties.

In light of our conclusion that the circuit court erred by failing to find that an established custodial environment existed with both parties, we decline to address defendant's argument that the court's findings with regard to several of the best-interest factors were against the great weight of the evidence. On remand, the circuit court will be required to assess the best interests of the children using the appropriate evidentiary standard. MCL 722.27(1)(c) (stating that "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra